

Posner's Laws of Pragmatism

Frontiers of Legal Theory. By Richard A. Posner. *Harvard University Press*. 445 pp. \$35.

Reviewed by Robert T. Miller

Judge Richard A. Posner is for many the most brilliant jurist of our times. A judge of the United States Court of Appeals for the Seventh Circuit, a former chief judge of that court, and a senior lecturer in law at the University of Chicago, Posner is best known as a founder and outstanding practitioner of the law and economics movement, an academic project that seeks to use economic analysis to understand and improve the law.

He is also an extraordinarily prolific author. In addition to producing scores of scholarly articles and some of the law's most influential judicial opinions, Posner also writes an average of a book a year. In the last decade alone, he has published books on the economics of aging, law and literature, antitrust policy, the federal court system, Justice Benjamin Cardozo, legal theory in England and America, the foundations of moral and legal philosophy, the impeachment of President Clinton, and the contested presidential election of 2000. He also regularly brings out updated editions of his *Economic Analysis of Law*, the standard introductory work on law and economics. According to legend, when a young Richard Posner clerked for Supreme Court Justice William Brennan, he once drafted an opinion for the Justice in under thirty minutes. The tale is not wholly implausible.

Frontiers of Legal Theory is Posner's latest attempt to apply the results of intellectual disciplines more rigorous than law—such as economics and psychology—to practical legal problems in order “to orient law in a more scientific, economic, and pragmatic direction.” Since, in Posner's view, law is best understood as a servant of social needs—as one tool among others to help human beings living in community achieve their goals—it makes sense to use the best available knowledge to change the law to better serve society's needs.

This approach to legal problems is more easily illustrated than described. An important result in economics known as the Coase Theorem, for example, states that where transaction costs are zero, the law's initial assignment of rights is irrelevant to efficiency, since if the assignment is inefficient, the parties will rectify it by a corrective transaction. Roughly, if there are no costs to transferring legal rights (and in the real world, there are always such costs, sometimes low, sometimes high), then if someone values a right more highly than does its legal owner, he will purchase the right from the owner and the right will migrate to the person who values it most. (Readers unfamiliar with economics should note that there is no problem here of the person who values a right most highly being unable to pay for it, for when economists talk about persons valuing things, they mean that such persons are willing and able to pay for them, not just that such persons would very much like to have them.) One corollary Posner draws from the Coase Theorem is that where transaction costs are irremediably high, the law should replicate the market allocation that would result if transaction costs were zero by assigning legal rights to those users who value them most.

In Posner's hands, such seemingly simple principles lead to surprisingly illuminating results. The fair use doctrine in copyright law, for example, allows anyone to make “fair use” of a

copyrighted work without payment to the copyright holder, as when I quote from Posner's copyrighted book in this review. This doctrine, Posner explains, is an instance of the law allocating legal rights efficiently where high transaction costs prevent the market from doing so. It costs too much in time and effort for me (and everyone else who wants to quote from his works) to negotiate with Posner for the right to do so, but if I could negotiate with him costlessly, he would probably agree to let me quote short passages from his book without payment, for my review is free publicity for his book and will stimulate sales.

Similarly, government's power of eminent domain, by which it may compel an owner of property to sell that property for its fair market value, is also a legal device for overcoming high transaction costs. Most taxpayers in a certain city may, for instance, be willing to pay a small amount to build a public park to be located on the property owner's land, but they may be prevented from buying the land by the high costs of organizing and pooling their money. Eminent domain overcomes this problem by allowing government to tax each potential user of the park, pool the money, and compel the transfer. These two seemingly unrelated legal rules—the fair use doctrine in copyright law and the law of eminent domain—thus turn on the same economic issue: the problem of overcoming high transaction costs.

But *Frontiers of Legal Theory* goes beyond many of Posner's other books to propose how disciplines other than economics can solve practical legal problems. Posner's signature economic analyses figure prominently, of course, including in treatments of judicial review, free speech, economic inequality, the uses of cost-benefit analysis, and the Federal Rules of Evidence, but the book also includes chapters that appeal to history, psychology, and epistemology. The chapters on the use of history in legal theory, for instance, include a powerful critique of the two published volumes of Bruce Ackerman's projected *We the People* trilogy as well as a pitiless deflation of Paul Kahn's *The Cultural Study of Law*. Posner argues convincingly that much of the history used by practicing lawyers and constitutional theorists amounts to an unpersuasive attempt "to forge a historical pedigree for their preferred positions in order to deflect charges of judicial creativity." History, unlike economics, thus turns out to have little value for solving practical legal problems. A surprising exception is the kind of originalism advocated by Robert Bork and Justice Antonin Scalia, which Posner argues is not an attempt to give the past normative force for the present but a pragmatically grounded method of promoting democratic forms of lawmaking by curtailing judicial discretion.

The chapters on psychology and epistemology are rich as well, and I choose a single illustrative point. Cognitive psychology, Posner tells us, reveals that human beings tend to give undue weight in decision making to more easily remembered facts and images. Psychologists call this tendency to be affected by what is more easily remembered the availability heuristic. Posner argues that, because the heuristic tends to distort decision making, judges and juries (and those who frame legal rules governing their work) should guard against favoring the parties they literally see—those present in the courtroom—to the detriment of those whom they do not see, persons whose interests might be affected but who do not appear in court. For example, the availability heuristic leads judges to favor convicted criminals pleading for lighter sentences because the judges see the criminals with their own eyes, while crime victims are not parties to criminal cases and often cannot even attend the proceedings, as when the criminals being tried have murdered them. The distortion caused by the availability heuristic in this situation can be

roughly balanced, Posner argues, by allowing victims (or their survivors) to make victim impact statements. More generally, good judicial temperament consists not so much in empathizing with the parties who appear in court (because of the availability heuristic, that is all too easy) but in keeping in mind the interests of those who do not appear.

The book has some minor faults, mostly inconsistencies probably arising from Posner's having assembled the text from previously published articles. For example, in an early chapter Posner argues that although some economists say that making government pay the fair market value for property it takes by eminent domain will cause the level of such takings to be efficient, this is a mistake, for government, with its power to acquire funds coercively by taxation, does not respond to financial incentives the way everyone else does. Later, however, in discussing whether evidence obtained in illegal police searches should be admissible in court, Posner makes this very mistake himself by arguing that the frequency of such searches should be set at an efficient level by making the government pay the defendant compensatory damages for violating his constitutional rights in conducting the search. Similarly, in discussing the social costs of pornography, Posner first argues that pornography's offensiveness "is very difficult to measure in even the roughest terms," but in the very next paragraph he says that the offensiveness cost "is in any event likely to be modest."

There is a curious lapse of a different kind when Posner says that the Golden Rule means that we should "be kind to the kind, and unkind to the unkind." This seems to be the ancient Greek idea, criticized by Plato in the *Republic*, that justice is helping our friends and harming our enemies, not the Golden Rule of the gospel, which is that we should treat others as we would be treated by them.

Still, these minor shortcomings notwithstanding, there can be no doubt that in *Frontiers of Legal Theory* Judge Posner has succeeded again. In the concluding chapter, moreover, he gives us reason to expect that there will be much more to come. He refers to a study showing that judges tend to retain their faculties of legal reasoning until the age of eighty. Posner was born in 1939. That means that we can look forward to another twenty years of Posner's amazing productivity, to a score of books, to hundreds of articles and judicial opinions, and to economic and legal analyses that are by turns illuminating, startling, and provocative.